SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 12 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

— VS —

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT.

BRIEF FOR APPELLANTS

MacDONALD GALLION
Attorney General of the
State of Alabama
GORDON MADISON
Assistant Attorney General
of the State of Alabama
NICHOLAS S. HARE
Special Assistant Attorney General
of the State of Alabama
J. M. BRECKENRIDGE, City Attorney
for the City of Birmingham,
Attorney for Robert K. Austin,
As Warden of the City Jail of
Birmingham, Alabama, Appellant.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement of the Case	4
The State Prison System	7
Jefferson County Jails	8
The Birmingham City Jail	8
Summary of Argument I	9
Summary of Argument II	9
Summary of Argument III	10
Argument I	13
Argument II	14
Argument III	16
Conclusion	30
Certificate of Service	32
Appendix A	33
Appendix B	44
Appendix C	47

CITATIONS

CASES: Page

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 89 L.Ed. 1725, 65 S. Ct. 1384 ..... 10, 16

Allied Stores of Ohio, Inc. v. Bowers, Ohio 1959, 358 U.S. 522, 3 L.Ed. 2d 480, 79 S. Ct. 437 ..... 10, 15

Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873, 74 S. Ct. 686 19

Childs v. Pegelow, 321 F. 2d 487, 491 (4 Cir. 1963) cert. den. 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed. 2d 652 (1964) 21

Cohen v. United States, 252 F. Supp. 679 ..... 24, 25

Edwards v. Sard, 250 F. Supp 977 (D.C. Dist. 966) 7, 19, 20, 26

Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392, reh. den. 330 U.S. 855, 91 L.Ed. 1297, 67 S. Ct. 962 ..... 10, 16

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 2

Johnson v. Virginia, 373 U.S. 61, 10 L.Ed. 2d 195, 62 S. Ct. 1053 19

Jones v. Willingham, Warden, United States Penitentiary, Leavenworth, Kansas, 248 F. Supp. 791 ..... 20, 21

Labat v. McKeithen, et al, 361 F. 2d 757 21

McGlaskey v. Maryland, 337 F. 2d 72 ..... 11, 20, 22

Pierce v. LaVallee, 293 F. 2d 233 (2d Cir., 1961) 21

Price v. Johnson, 334 U.S. 266, 285, 92 L.Ed. 1356, 68 S. Ct. 1049, 1060 ..... 11, 21, 22

Radio Corporation of America v. United States, 341 U.S. 412 2

Roberts v. Pepersack, et al., 256 F. Supp. 415 22

Singelton v. Board of Commissioners, et al., 356 F. 2d 711 19

Sostre v. McGinnis, 334 F. 2d 906, 908, cert. den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168 ..... 11, 12, 14, 20, 21

United States v. Fay, 197 F. Supp. 855 ..... 12, 20

United States v. Illinois, et al, 343 F. 2d 120 ..... 11, 20

United States v. Pate, 229 F. Supp. 818 ..... 12, 20

Walker v. Pate, 356 F. 2d 502 ..... 11, 20, 24

Washington, et al v. Frank Lee, et al., 263 F. Supp. 327 ..... 1, 2

CONSTITUTION OF THE UNITED STATES:

Eighth Amendment 5, 9, 14

Fourteenth Amendment 2, 5, 15, 25

STATUTES OF ALABAMA:

Code of Alabama 1940, Recompiled 1958:

Title 45, Secs. 4, 52, 121, 122, 123, 172, 183 ..... 2, 3, 5

Page

STATUTES OF THE UNITED STATES:

United States Code:

Title 28, Sec. 1253 2

Title 28, Sec. 2281 4

MISCELLANEOUS:

Federal Rules of Civil Procedure:

Rule 23 ..... 2, 4, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

— VS —

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

BRIEF FOR APPELLANTS

OPINION BELOW

The Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a Three-Judge District Court, from which this appeal is taken (R. 123-134) is reported at 263 F. Supp. 327 and is set forth in full in Appendix A to this brief.

JURISDICTION

The judgment of the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a

Three-Judge District Court, was rendered on the 12th day of December, 1966 (R. 123-134), 263 F. Supp. 327. On the 6th day of February, 1967 certain defendants in the court below (Appellants here), namely Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as Members of the Board of Corrections of Alabama, took an appeal to the Supreme Court of the United States from said final order of December 12, 1966 (R. 134-137). On the 8th day of February, 1967 Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, a defendant in the Court below (an Appellant here), took an appeal to the Supreme Court of the United States from said final order of December 12, 1966 (R. 137-139). Each of said appeals were taken pursuant to 28 U.S.C., Section 1253. Probable jurisdiction was noted by this Court in its order of May 29, 1967 and this case placed on the summary calendar (R. 210). Jurisdiction to review by appeal an order granting or denying a permanent injunction in any civil action, suit or proceedings required by an act of Congress to be heard and determined by a district court of three judges, is conferred upon this Court by 28 U.S. Code, Section 1253. That such a jurisdiction exists in the circumstances of this case is sustained by the following authorities: *Radio Corporation of America vs. United States*, 341 U.S. 412; *Florida Lime & Avocado Growers, Inc. vs. Jacobsen*, 362 U.S. 73.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and Rule 23, Federal Rules of Civil Procedure. Also involved in this case are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958. Each of said sections are set out separately in Appendix B of this Brief.

QUESTIONS PRESENTED

The Appellees (plaintiffs in the court below), each of whom is a prisoner or former prisoner of a state, county or city jail in the State of Alabama, claim a right not to be segregated, classified, designated or otherwise subjected to racial distinction

in confinement in the state penal system and in the county, city and town jails of the State of Alabama. The Appellees also asserted in their complaint that various statutes enacted by the Legislature of the State of Alabama requiring segregation by race in the state, county and city penal facilities are unconstitutional. Said statutes are as follows: Sections 4, 52, 121, 122. 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958 (set out in Exhibit B of this Brief).

The Appellants (defendants in the Court below) deny the claims of Appellees and say that the separation of Negro and white prisoners in the prisons and jails of Alabama to the extent that such separation exists is for reasons of internal security of the prisons and jails and to protect the prisoners, jailers and others from bodily harm.

The questions presented are:

"1. Do state statutes which require the separation of white and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Does a prisoner serving a penitentiary sentence have the constitutional right to question the validity of state statutes requiring the separation of prisoners by race?

3. Does the District Court have jurisdiction and authority to require the defendant Commissioner of Corrections of Alabama to supervise the desegregation of all penal state facilities, including cities of under ten thousand population where state statutes invest authority in the said Commissioner only as to cities over ten thousand population?

4. Are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

5. Does the District Court have authority to order the defendant Frank Lee, as Commissioner of the Board of Corrections, to make reports to the court every three months, beginning March 15, 1967, as to the steps taken and progress made to eliminate segregation in the state penal institutions and the county and city jails in the State of Alabama?

6. Do the plaintiffs in this case have standing to challenge any of the statutes or practices requiring segregation, or relating to the segregation by race of the penal facilities of the City of Birmingham?

7. Is the appellant Austin (a defender below) representative of other wardens and jailers of city and town jails of Alabama to the extent that plaintiffs may maintain this action against said Austin as representing a class composed of all other city wardens and jailers in Alabama under Rule 23, Federal Rules of Civil Procedure?

8. Does a Negro prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the white race where such warden is not compelled to do so by statute?

9. Does a white prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the Negro race, where such warden is not compelled to do so by statute?

10. Does the Order appealed from unduly restrict the exercise of lawful discretion on the part of state prison officials in the administration of the prisons?"

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on December 12, 1966 by the U. S. District Court for the Middle District of Alabama, specially constituted as a three-judge court pursuant to 28 U.S.C. §2281, declaring unconstitu-

tional Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, and ordering the desegregation of state penal facilities, county and municipal jails.

Appellees instituted this suit as a class action on February 18, 1966, alleging that provisions of Alabama law requiring the separation, classification or designation of prisoners on the basis of race were unconstitutional and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States.

The final order of the U. S. District Court for the Middle District of Alabama, Northern Division, (R. 123-134) was rendered December 12, 1966, is reported at 263 F. Supp. 327 (1966), and is set out in full in Appendix A of this brief. The District Court declared Sections 4, 52, 121, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, to be in violation of the Fourteenth Amendment of the Constitution of the United States to the extent that they require segregation of the races in the prisons and jails of Alabama (R. 132). The District Court ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed desegregation within six months, in all areas, including quarters. Very exceptional instances such as, for example, the use of the "drunk tank", were excluded from the order (R. 129). The appellant Frank Lee (a defendant below), as Commissioner of the Board of Corrections for the State of Alabama, was ordered to take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system, and to effect the complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months (R. 132). The defendants were also ordered to take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year (R. 132, 133). Appellant Robert K. Austin (a defendant below) and each warden in each town and city in the State of Alabama were ordered to take the necessary and appropriate steps to completely desegregate the town and city jails, and any

other penal facilities and operations that are maintained by any such town or city, within a period of six months (R. 133). The appellant Lee, as the Commissioner of the Board of Corrections for the State of Alabama, was ordered to supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to the Court every three months concerning the steps being taken and the progress being made in state penal institutions and county and city jails and other penal facilities (R. 133).

Notice of Appeal was filed by defendant Frank Lee, as Commissioner of the Board of Corrections of Alabama, and the defendant Members of the Board of Corrections of Alabama, and on February 6, 1967 (R. 134-137). Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, on February 8, 1967 (R. 137-139). Probable jurisdiction of the Appeal was noted by this Court in its Order of May 29, 1967, and this case placed on the summary calendar (R. 210).

The Appellees (plaintiffs in the Court below) placed on the stand only one witness, Mr. John O. Boone, an employee of Southern Regional Council, a human relations agency with headquarters located in Atlanta, Georgia (R. 145). Mr. Boone testified that he held an A.B. degree from Morehouse College and a Master of Social Work degree from Atlanta University (R. 146). Mr. Boone is a former employee of the federal prison system, having been employed for approximately fourteen years at the Atlanta federal penitentiary (R. 146). Mr. Boone testified that in his opinion desegregation of prisoners could be accomplished without difficulty if "properly managed" (R. 147). Mr. Boone further testified that desegregation of the Atlanta federal penitentiary was started in 1951 and completed last year (1965) (R. 149); that his experience was entirely in the federal prison system and that he had not visited any Alabama prison (R. 152, 153); that in his opinion race is not a relevant characteristic under any set of circumstances for the purposes of assignment of either work, dormitory space or otherwise in a penal institution (R. 154); that he disagreed with the opinions of Mr. Charles M. Rogers, Deputy Superintendent of Lorton Penitentiary, Mr. Thomas R. Sard, Director of Corrections for the District of Columbia, and Superintendent Kermit A. Weakley of Lorton Penitentiary, that race is a factor to be considered in assignment of prisoners to dormitories and that interracial mixing should be

accomplished to the extent that such can be done " - - - and maintain the security and safety of the institution" (R. 155, 156). The opinions referred to above relating to Lorton Penitentiary are reflected in *Edwards v. Sard*, 250 Fed. Supp. 977 (D.C. Dist. 1966). After having testified that in the desegregation of prisons race is not a relevant characteristic "under any set of circumstances" (R. 154), Mr. Boone, the only witness for the Appellees testified on cross-examination that in his opinion there were circumstances when desegregation would present some difficulty as follows: "Now, if the atmosphere is poor, if management is not ready for it, if the people and you—and if the process of desegregation is handled poorly, why, yes, you would have some difficulty possibly" (R. 156).

THE STATE PRISON SYSTEM

The Alabama Prison System consists of two prisons for men, one honor camp, a correctional center, a youth center, a cattle ranch, a trusty barracks, a prison for women, and approximately 25 highway road camps, in all of which about 1,500 white and 2,500 colored prisoners are kept. Of these institutions, only the youth center, the cattle ranch and the highway road camps are segregated. Members of both races are assigned at all of the other institutions.

In those institutions to which members of both races are assigned, Negroes and whites do not sleep together or eat together or, generally speaking, use the same facilities at the same time although they may use the same facilities at different times. One exception to this is the Kilby Prison Hospital where the tubercular ward is integrated. White and colored prisoners do work together and there is some joint recreation.

With the exception of the Commissioner, two deputy commissioners and administrative assistants all personnel employed by the Board of Corrections are employed from a list of those who have passed the State Merit System examination for their particular classification of employment. These examinations are supervised by the State Personnel Board whose practices are not here challenged. At present, all employees of the Board are white.

JEFFERSON COUNTY JAILS

The facilities of Jefferson County jails are used interchangeably by both races but not on an intermixed basis (R. 189). Religious services are integrated (R. 187). The sheriff of Jefferson County, Alabama, testified that there are situations in the Jefferson County Jail where it is desirable to segregate some prisoners from others on the basis of race (R. 187).

THE BIRMINGHAM CITY JAIL

In relation to the Birmingham City Jail, the record shows the following: The prisoners in this jail are short-term prisoners which total about two thousand prisoners per month (R. 192). The average daily jail population is from three to four hundred (R. 192). The average stay per prisoner in the jail is about seven to fifteen days (R. 192, 193). There are some areas of the jail operated on an integrated basis, such as the trustees, farm work crews, concrete pipe work crew, and maintenance crew (R. 193). Prisoners are assigned to a duty that they are capable of performing, regardless of race (R. 193). The prisoner problems at a city jail such as the Birmingham City Jail are different from those which would be experienced by prisoners such as Kilby (a state penitentiary) or the Atlanta federal penitentiary (R. 194). Over fifty per cent of the Birmingham City Jail prison population came there as a result of the use of alcohol or alcoholic beverages and are in a drunken condition when received (R. 194). This definitely presents a problem in the matter of security and discipline of the prison (R. 194). To put Negro prisoners and white prisoners together in the "drunk tank" at the jail would aggravate prison security problems, and be a hazard to the safety of the prisoners (R. 194). The Birmingham City Jail has a large "bull pen" for Negro drunks and another large "bull pen" for white drunks (R. 195). In addition to the "bull pens," there are eight individual cells used to hold drunks when needed, but there are so many drunks coming in that the ones placed in the cells cannot be kept there for as long as prison officials would like (R. 195). White prisoners and Negro prisoners have separate visiting times (R. 196) due to the limited visiting space. In the Birmingham City Jail the separation of Negro and white prisoners, to the extent that such separation exists, is because, in the opinion of the Warden of the Jail (Appellant Austin), such separation is necessary to

maintain the internal security of the prison and to protect the prisoners and others from bodily harm (R. 96). No segregation of prisoners according to race at the Birmingham City Jail is presently employed except as is necessary in the opinion of the Warden to maintain the internal security of the prison and protect the prisoners and others from bodily harm (R. 96, 97). The Warden of the Birmingham City Jail furnishes the Chief of Police of the city monthly a report which lists by color, sex and age the number of prisoners confined in said City Jail according to offense charged (R. 97). The report for May, 1966, which was attached to the answer to interrogatories, shows a total of 2,021 prisoners for that month (R. 97, R. 104-118).

SUMMARY OF ARGUMENT

I.

NO ORDER OR DECREE SHOULD BE SUSTAINED ON THE BASIS OF A CLASS ACTION WHEREBY THE WARDEN OF THE LARGEST CITY IN THE STATE OF ALABAMA IS NAMED AS A REPRESENTATIVE OF ALL OTHER WARDENS AND JAILERS OF CITY AND TOWN JAILS OF ALABAMA.

There is no authority under Rule 23, Federal Rules of Civil Procedure, or otherwise, to make Appellant Austin a representative defendant of all wardens and jailers of city and town jails, both large and small, in Alabama. No evidence was offered which showed a similarity between Birmingham City Jail and other city and town jails in Alabama. Prison discipline and internal security is of paramount importance in a prison or jail. The problems of the Birmingham City Jail may not be comparable to the smaller city and town jails of Alabama. If a class action was to be maintained, there should have been several different population classifications of cities and towns and a representative warden selected from each classification.

II.

STATE STATUTES REQUIRING THE SEPARTION OF PRISONERS BY RACE IN STATE, COUNTY, CITY AND TOWN JAILS IN THE STATE OF ALABAMA ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The primary purposes of a jail are (1) to punish a convicted offender, (2) to serve as a deterrent to the commission of other crime or offenses by such offender or others, and (3) to safeguard society by separating therefrom persons of criminal inclinations who have been convicted of particular crimes or offenses. The proportion of violent and hostile individuals in a prison or jail population is far greater than the proportion of such persons in the general population. The same rules relating to race which have been judicially applied since 1954 to public parks, schools and similar public facilities are not applicable to and should not be applied to prisons and jails. This Court has held that if any state of facts reasonably can be conceived that will sustain a statute, the statute should be sustained by this Court. *Allied Stores of Ohio, Inc. vs. Bowers,* Ohio 1959, 358 U.S. 522, 3 L. Ed. 2nd 480, 79 S. Ct. 437. In *Alabama State Federation of Labor vs. McAdory,* 325 U.S. 450, 89 L.Ed. 1725, 65 S. Ct. 1384, this Court held that where a statute is assailed as unconstitutional the Court *must* assume the existence of any state of facts which would sustain the statute. A statute should not be struck down if it is within the State's consitutional power, even though it may approach the verge of that power. *Everson vs. Board of Ed. of Ewing Tp.,* 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392, reh. den. 330 U.S. 855, 91 L.Ed. 1297, 67 S. Ct. 962.

Certainly, there existed facts which were available to the legislature enacting said statutes and which exist today relating to the integration of the races in prisons and jails of Alabama which indicated then and even today that such integration would adversely affect prison discipline and internal security.

III.

THE MAINTENANCE OF DISCIPLINE AND INTERNAL SECURITY IN A PRISON IS MOST IMPORTANT TO SOCIETY, PRISON PERSONNEL AND THE INMATES THEREOF AND THE EXERCISE OF REASONABLE ADMINISTRATIVE DISCRETION THEREIN SHOULD NOT BE HAMPERED BY INFLEXIBLE JUDICIAL ORDERS, EVEN IF THE EXERCISE OF THAT DISCRETION RESULTS IN SOME SEGREGATION OF THE RACES.

Even if this Court should hold the statutes involved in this case invalid, it does not follow that the determination of what is necessary to maintain discipline and internal security in a prison even in the area of race should not be left to the prison administrators best qualified to make such a determination.

Walker vs. Pate, 356 F. 2d 502, denotes the importance of prison discipline and security in words as follows:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . .. A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights."

A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline or internal security; *Sostre vs. McGinnis*, 334 F. 2d 906, 908, cert. den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168. Who should determine which so-called rights will or will not impair the requirements of prison discipline? We respectfully suggest that the prison administrators of a particular prison determine which so-called rights may be granted the inmates of that prison since they are in a better position to make a determination in the matter than the courts.

In *Price vs. Johnson*, 334 U.S. 266, 285, 92 L.Ed. 1356, 68 S. Ct. 1049, 1060, this Court stated that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited, *United States vs. Illinois, et al.*, 343 F. 2d 120, and yields to the require-

ment of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis*, 334 F. 2d 906, cert. den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

The order of the three-judge court from which this appeal is taken places in the court detailed supervisory authority over prison officials in the administrative management of their prisons insofar as such management relates to race. This order dilutes prison officials' authority to maintain prison discipline and security where race is a factor and can result in procedures being adopted because such order seems to so demand rather than being adopted solely with a view of what is best for prison discipline and security in a particular prison or jail.

It is important that state and city prison officials be permitted to manage and regulate their prisons, and separate, segregate and assign prisoners all as seems to them is in the best interest of prison discipline and security, without regard to ordered directions from a Federal Court.

We respectfully suggest that the Fourteenth Amendment does not require the federal courts to affirmatively promote and require the integration of prison and jail activities and facilities as the District Court intends to do under the order and decree appealed from. A prisoner loses many rights when he enters a prison, including some constitutional rights. Such is the nature of imprisonment.

We respectfully ask this Court to hold that the separation of the races in a prison or jail by administrative officials in charge of such prison or jail, when they are of the opinion that such separation will aid in maintaining discipline and prison security, is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would pre-empt the exercise

of lawful and reasonable discretion on the part of prison administrators.

When he is committed to prison, a prisoner loses his right to select his associates. His associates are selected by the prison administrators after considering all aspects of the situation. Where used to promote discipline and not discrimination, the race of the prisoner is as valid a consideration as any other.

ARGUMENT

I.

NO ORDER OR DECREE SHOULD BE SUSTAINED ON THE BASIS OF A CLASS ACTION WHEREBY THE WARDEN OF THE LARGEST CITY IN THE STATE OF ALABAMA IS NAMED AS A REPRESENTATIVE OF ALL OTHER WARDENS AND JAILERS OF CITY AND TOWN JAILS OF ALABAMA.

This case insofar as it purports to be a class action against Appellant Robert K. Austin, as warden of the city jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated, is without authority. There is no allegation that other wardens and jailers are similarly situated as the warden of the city jail of Birmingham. *The most important issue in this case is the issue of prison discipline and security.* We respectfully submit that no judicial decision which places every city, town and village jailer in the State of Alabama under an injunction or order such as the decree appealed from should be rendered in a scatter gun action in which the particular factual conditions applicable to each jail and the community served by it are not placed in evidence before the court. It is apparent that the city jail of the City of Birmingham, a municipality in excess of 340,000 inhabitants located in a county of over 600,000 inhabitants has little in common with the many small town jails in this State. The Appellant Robert K. Austin is not and cannot under the law of Alabama be a representative of all wardens and jailers of city and town jails in Alabama. This Court judicially knows that the Appellant Austin has no

control, supervision or duties with respect to any jail in the State of Alabama other than the Birmingham City Jail. The Appellees by their naked allegations cannot make him such a representative. The questions of fact applicable to all the unnamed class are not the same as the questions of fact applicable to the Appellant Austin.

We respectfully submit that this case should not affect the duties and obligations of the jailers of the small towns and the smaller cities of this State unless they are made parties hereto and granted the privilege to submit evidence as to conditions at their jails, the supervising force thereat, and such other conditions relevant to such jails and the community served thereby as is relevant.

As will be pointed out hereinafter in this Brief, all constitutional rights which a person has outside of a jail do not necessarily follow him into a jail as a prisoner. In prison, a prisoner has only such rights as can be exercised without impairing the requirements of prison discipline and security. *Sostre vs. McGinnis*, 334 F. 2d 906, cert den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

For the protection of society, prison personnel and the prisoners themselves, the Courts have wisely subordinated *all* claimed constitutional rights of prisoners to the reasonable requirements of prison discipline and security. In a matter so important as prison discipline and security, we respectfully submit that no suit for injunction relating thereto should be considered unless the prison officials of each municipality involved are parties thereto and the proposed injunction is weighed against the facts relevant to each city or town jail and the community served thereby.

II.

STATE STATUTES REQUIRING THE SEPARATION OF PRISONERS BY RACE IN STATE, COUNTY, CITY AND TOWN JAILS IN THE STATE OF ALABAMA ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

Jails are primarily maintained for the purpose of punishing a convicted offender, of acting as a deterrant to the commission

of other crimes or offenses by such offender or others, and for safeguarding society by separation therefrom of persons of criminal inclinations who have been convicted of particular crimes or offenses.

It is apparent to casual observation that a jail population of two thousand individuals is not comparable to a group of two thousand persons selected at random from the general population.

The addiction to violence, the disregard of law, and a hostile attitude may be expected of inmates of the average jail or penitentiary to a much greater degree than would be expected of a similar number of persons from the general population taken at random.

Therefore, we respectfully contend that the same rules relating to race which this Court has decreed since 1954 in connection with public parks, schools and similar public facilities are not applicable to prisons, and should not be so extended. The state statutes held invalid in this case as violating the Fourteenth Amendment were, of course, enacted by the Legislature of Alabama. These statutes require the classification of prisoners in connection with certain prison activities according to race. This Court has held that a classification (in a case involving taxes), though discriminatory, is not arbitrary nor violative of the Fourteenth Amendment *if any state of facts reasonably can be conceived that will sustain it. Allied Stores of Ohio, Inc. vs. Bowers*, 358 U.S. 522, 3 L.Ed. 2d 480, 79 S. Ct. 437. Certainly, it can be assumed that the propensity for violence and disorder in a prison population was a matter within the knowledge of the Legislature when the statutes involved in this case were enacted. If the purposes of these statutes were, as we contend, to maintain the internal security of the prisons and jails of the State and to protect the prisoners, jailers and others from bodily harm, then they should not be summarily struck down.

In presenting the above argument we are not unmindful of the decisions of this Court which have not recognized the probability of disturbances and breaches of the peace as sufficient to sustain a classification based on race in a statute applicable to the general population and relating to schools, public

parks or similar public facilities. Such facilities are not comparable to prisons. In all such facilities the use of the facilities is voluntary and the primary purpose thereof is for the enjoyment or beneficial use derived by the users thereof. The primary purpose of prisons is not for the enjoyment or beneficial use thereof by the inmates. The inmates are not there voluntarily. The need for order and discipline in prison because of the nature of a prison and the concentration therein of persons both white and black with belligerent and hostile attitudes is far greater than in the general population. Facts existed which indicated to the Legislature that the statutes involved in this case would promote prison security. Certainly, no racial riots have occurred in Alabama prisons and jails while operating under these statutes. This Court has held that where a statute is assailed as unconstitutional the Court *must* assume the existence of any state of facts which would sustain the statute in whole or in part. *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450, 89 L.Ed. 1725, 65 S. Ct. 1384. We respectfully contend that such facts exist and the said statutes should be sustained. This Court has held that a State statute should not be struck down if it is within the State's constitutional power, even though it may approach the limit of that power. *Everson vs. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392, reh. den., 330 U.S. 855, 91 L.Ed. 1297, 67 S. Ct. 962.

III.

THE MAINTENANCE OF DISCIPLINE AND INTERNAL SECURITY IN A PRISON IS MOST IMPORTANT TO SOCIETY, PRISON PERSONNEL AND THE INMATES AND THE EXERCISE OF REASONABLE ADMINISTRATIVE DISCRETION THEREIN SHOULD NOT BE HAMPERED BY INFLEXIBLE JUDICIAL ORDERS, EVEN IF THE EXERCISE OF THAT DISCRETION RESULTS IN SOME SEGREGATION OF THE RACES.

If, for the purpose of argument only, we assume that the decree of the District Court insofar as it held invalid statutes involved in this case is due to be affirmed, it does not follow that the District Court is due to be affirmed in that aspect of the decree which requires complete integration of the prisons and jails of the State of Alabama. If the statutes are held invalid

and void, they will cease to be of any effect. The prison and jail administrators and wardens would then exercise their responsibility for the security and safety of the prisons in the area of race, as in other areas, based on their determination of the situation in their respective prison or jail.

Occupying the position of warden includes bearing the burden of maintaining prison security and discipline. In carrying out this responsibility, the warden must choose the course to follow which will result in the maximum good for all concerned. This necessarily requires that much be left to his discretion. It is the exercise of sound discretion and sound judgment by the warden, the man on the scene, which should prevail. A judicial opinion, however well reasoned, may turn out to be unrealistic. Inflexible pronouncements of the court may bind the hands of the prison authorities so as to endanger the lives of all concerned..

One of the decisions that should be left up to the discretion of the various wardens is whether prisoners should be separated on a basis of race when good judgment and common sense require it. The decision which is reached on that question may be different in a maximum security prison from that in a minimum security prison; it may be different in Macon County from Marshal County; in Hayneville from Huntsville. There are too many varying factors involved for the court to "freeze" a pattern. Each instance where segregation is deemed by any person to be in violation of constitutional rights can and should be immediately reviewed. The courts through their injunctive powers can force immediate correction; no lasting damage or harm can result from such a course. On the other hand, if you remove discretion by a rigid decree violence and even death may follow.

The point of the appellant's argument here is that the wardens must have the authority to do as they, in their experience and judgment, conscientiously believe is best under the circumstances. If there should be any abuse of this discretion (and even in the present situation, where the prisons and jails are being administered under the mandate of the State laws, there has been no evidence introduced that the operation of the prison system has been abusive or unequal as regards either race) then the District Court could move in to investigate the

particular situation just as it has been so quick to do in many fields.

Under such conditions, the prison and jail administrators and wardens would then exercise the responsibility for the security and safety of the prisons in the area of race as in other areas, based on their determination of the situation in their respective prison or jail. It would be their decision as to whether racial separation in a particular prison or jail activity at a particular time was necessary or whether integration was feasible and could be accomplished without danger to prison discipline or security. That does not mean that the prisons should or will have a strict policy of apartheid; such a policy has no place in a modern prison system and this fact should be so recognized. The record in this case shows clearly that the appellants would not take an arbitrary or capricious approach to the questions involved in this case.

Sheriff Melvin Bailey of Jefferson County, Alabama, a respondent in the case below testified in effect that the facilities of Jefferson County Jails are used interchangeably by both races but not on an intermixed basis (R. 189). Religious services in the Jefferson County Jail are, however, integrated (R. 187). In this county jail the trusties are integrated (R. 186). There are situations in the Jefferson County Jail where it is desirable to segregate some prisoners from others on the basis of race (R. 187).

In the Birmingham City Jail the separation of Negro and white prisoners to the extent that such separation exists is because, in the opinion of the Warden of the Jail (Appellant Austin), such separation is necessary to maintain the internal security of the prison and to protect the prisoners and others from bodily harm (R. 96). No segregation of prisoners according to race at the Birmingham City Jail exists except to the extent necessary to maintain the internal security of the Jail and protect the prisoners and others from bodily harm (R. 18, 19, 96, 97).

There is no evidence in this case and no theory of law which justifies the summary substitution of the judgment of a federal court for the judgment of trained and experienced prison administrators relating to prison discipline and security, as will

result if the judgment, appealed from in this case is affirmed without modification.

We are not unaware of the decision of the Fifth Circuit Court in the case of *Singleton vs. Board of Commissioners, et al.*, 356 F. 2d 771, and the fact that if said case is applicable it was binding on the District Court in this case. However, said case, even if applicable, is not binding on this Court and this Court has not heretofore subordinated prison security and discipline to claimed constitutional rights of prisoners. *Singleton*, supra, is not applicable to this case because: (1) It related only to reform schools of the State of Florida and the issue of prison discipline and security was not made an issue in that case; (2) The reasoning in *Brown vs. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S. Ct. 686, related to segregation of schools and the physiological effect of such segregation on Negro children. Such physiological effect and its result does not exist in connection with prisons and if it did it should be subordinated to the requirements of prison discipline and security; (3) *Johnson vs. Virginia*, 373 U.S. 61, 10 L.Ed. 2d 195, 62 S. Ct. 1053, cited by the Circuit Court as authority for *Singleton*, supra, does not support an argument for court required integration of prisoners irrespective of the requirements of prison security and discipline. *Johnson, supra*, involved segregation by race of the public seats in a court room. A court room which is open to the public is not comparable to a prison or jail.

The case of *Edwards vs. Sard*, 250 F. Supp. 977 is a District Court case which involved dormitory housing at Lorton Federal Reformatory in the District of Columbia. As shown by the report of the case, the prisoners at this reformatory were serving sentences resulting from felony convictions and their sentences were measured by years. The ratio of Negroes and whites at Lorton was about ten Negroes to one white. Of the twenty-two dormitories at Lorton, only six were integrated. In *Edwards*, Mr. Charles M. Rogers, Deputy Superintendent of Lorton, who was in charge of making dormitory assignments, testified that he considered the race of prisoners as one factor in deciding to which dormitory to assign them. The *Edwards* case also indicates that Mr. Thomas R. Sard, Director of Corrections, considered race as material in the assignment of dormitory space to prisoners. The District Court in that case, in its opinion stated

that, "Mr. Sard indicated a sincere awareness of the desirability of achieving the greatest possible intermingling of the races consistent with the *security of the institution*". (Emphasis added). To further show the relation of race and prison security Mr. Sard, in the *Edwards* case, testified as follows: "We would like very much to have every dormitory we have integrated if we had a sufficient proportion of white to Negro to do this *safely*." (Emphasis added). In *Edwards*, the Court granted judgment for the defendants after it found in effect that the procedures at Lorton (although only six of twenty-two dormitories were integrated and race was considered in the assignment of prisoners) were satisfactory as being "consistent with the security of the institution".

When a prisoner is placed in jail, he has only such rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis*, 334 F. 2d 906, cert. den, 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited, *United States vs. Illinois*, et al., 343 F. 2d 120, and yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs, McGinnis*, 334 F. 2d 906, cert den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

Jones vs. Willingham, Warden, United State Penitentiary, Leavenworth, Kansas, 248 F. Supp. 791, is a case which involved action by an inmate of maximum security federal prison who claimed that he had been subjected to punishment and deprivation of privileged accorded adherents of other religious faiths because of his Black Muslim religion. The District Court held that the warden was fully justified in imposing upon prisoners professing Black Muslim beliefs restrictions precluding

them from meeting together as such and precluding their ministers from entering the penitentiary, in view of the responsibility of the warden to public and non-Muslim inmates.

In *Jones vs. Willingham*, the Court, in its decision, sets out some important principles relating to rights of a prisoner as follows:

> "Imprisonment carries with it many restrictions. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price vs. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). *'A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline.'* Sostre vs. McGinnis, 334 F. 2d 906, 908 (2d Cir., 1964), cert. denied, 379 U.S. 892, 85, S.Ct. 168, 13 L.Ed. 2d 96 (1964). '(E)xcept in extreme cases the courts will not interfere with the conduct of a prison with the enforcement of its rules and regulations, or its discipline * * * .' Childs vs. Pegelow, 321 F. 2d 487, 491 (4th Cir., 1963), cert. denied, 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed. 2d 652 (1964). One committed to prison, however, does not on entering the place of his confinement leave his constitutional rights at the gates. Pierce vs. LaVallee, 293 F. 2d 233 (2d Cir., 1961). The issue here may be stated as it was in the Pierce case:
>
> " * * * Either the plaintiffs were punished solely because of their religious beliefs or they were not. If they were, the defendant's conduct violates * * * the United States Constitution. If the plaintiffs were punished for legitimate reasons * * * (the) law is (not) violated.' l.c. 235-236." (Emphasis added)

In *Labat vs. McKeithen, et al.*, 361 F. 2d 757, the United States Court of Appeals for the Fifth Circuit held that a state statute to the effect that, until time of execution, convict shall be kept in solitary confinement and no one shall be allowed access to him without order of court, except certain persons, was reasonably construed by the State Attorney General to include the act of correponding with the prisoner.

In *Price vs. Johnston*, 334 U.S. 266, 285, 92 L.Ed. 1356, 68 S.Ct. 1049, 1060, the Supreme Court of the United States recognized the general rule of law that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."

In *Roberts vs. Pepersack, et al*, 256 F. Supp. 415, the District Court held that a prisoner, while in prison, was not entitled to freedom of speech and freedom to demonstrate. In rendering the above decision, the Court referred to *McClaskey vs. State of Maryland*, 337 F. 2d 72 (4th Cir., 1964), where the Court held that:

> "A propagandist has no judicially enforceable right to propagandise within the prison walls, whether his propaganda be directed to other inmates or to outsiders."

From the above decisions, it is clear that in dealing with alleged rights and claims of prisoners the courts have held that the dominant issue to be determined is not whether such alleged rights or claims are bottomed upon constitutional provisions but even if so bottomed, what effect, if any, will the recognizing or granting thereof have upon prison discipline and security? We do not believe that there exists any federal case where prison discipline and security was considered and subordinated to any claimed constitutional right. The very nature of a prison requires that there be no such subordination.

This being so, the exercise of a claimed right of a Negro prisoner not to be placed in a cell occupied only by other Negroes, or of a white prisoner not to be placed in a cell occupied only by other white persons, must be considered in the light of prison security and discipline.

This Court can judicially recognize that in the State of Alabama to place Negro and white drunks in the same "bull pen" in a city jail would not be as conducive to the maintenance of discipline and security as to place in separate "bull

pens" according to race. The same could be said of persons incarcerated for riotous or disorderly conduct. The same could be said of other persons who are by nature inclined to violence. It is common knowledge that prisons are not at all times under the supervision of guards and for that reason prison officials should assign and house them so as to reduce to a minimum all possible cause for disturbances. The plaintiff Thomas E. Houck, Jr., a white civil rights worker, alleged in the complaint (R. 3) that he was roughed up by white prisoners during his confinement. What would those same prisoners have done to Rap Brown?

Another situation readily comes to mind. The North and West have been rocked with repeated outbursts of Negro rioting, arson and looting. As yet, thankfully, these outbreaks have not evolved into biracial warfare but with the increasing tension in the cities and the irresponsibility of the riot leaders, biracial warfare is much less inconceivable than the Watts, Newark and Detroit riots were only two years ago.

For the sake of argument, suppose such warfare were to erupt in any city, Los Angeles, perhaps. Let us further suppose that the police moved in and arrested 100 whites and 100 Negroes who were battling in the streets. If the injunctive portions of the district court's order are allowed to stand, what would happen when these 200 rioters were incarcerated together in the completely integrated facility, under the requirement that there be no segregation?

This cannot be allowed to happen. Reasonable discretion must be left with the officials in charge of a prison or jail to decide what should be done under different circumstances. The maintenance of discipline and security in a state prison or a county, city, town or village jail is most important to society, prison personnel and the inmates; so important, that the exercise of reasonable discretion therein should not be hampered by inflexible judicial orders, even if the exercise of that discretion results in some segregation of the races. This would not result in overriding any of the prisoners' constitutional rights, but rather the prisoners' fundamental constitutional right of safety and freedom from harassment may require discretion-

ary separation of the races on some occasions and under some circumstances.

Attention is directed to the affidavit of A. Frank Lee, Commissioner of Corrections of Alabama, attached to the Application For Stay Pending Appeal, which affidavit, for convenience is set forth in full in Appendix C. This affidavit, made a part of the appeal as a basis for the Stay, is factually important in showing that circumstances may be present in many prisons and jails which would require more flexibility than is allowed by the rigid mandate of the lower court.

The importance of not disturbing the determination of prison officials as to prison discipline and security was forcefully recognized by the United States Court of Appeals for the Seventh Circuit in *Walker vs. Pate,* 356 F. 2d 502, where the court held that a prisoner's various complaints as to his not being permitted to keep some law books and to receive visits by his wife and daughter were matters within the scope of the prison's discipline and security. In this case, the opinion set out for the benefit of inmates of state prisons within the Seventh Circuit, the following:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . . . A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights."

An individual warden or jailer owes a duty to a prisoner placed in his custody to keep the prisoner safely and free from harm according to *Cohen vs. United States,* 252 F. Supp. 679. Neither the State nor a municipality in Alabama is liable in damages to a prisoner injured in a jail because the operation of the jail is a governmental function, but it is under a legal duty to protect each prisoner from harm while in custody. If

the duty to keep a prisoner free from harm is in the State, the municipality, the warden and the jailer, should not they rather than the federal courts determine what is reasonably necessary to insure such safety? The importance of this is made clear when we consider that in the *Cohen* case an award of $110,000 to the prisoner was approved by the District Court because of the negligence of prison administrators in permitting prisoner Cohen to be assaulted by a fellow inmate and seriously injured while in prison. The duty is on the municipality and the wardens and jailers to safeguard a prisoner at the Birmingham City Jail, and on the State and County and their prison administrators to safeguard prisoners in a county jail or state prison. This being so, no decree should be sustained that can do nothing but decrease the safety of prisoners and personnel at the state, county, city and town prisons and jails in the State of Alabama.

We believe that this is the first case to come before this Court which involves the authority of a federal court to direct particulars of prison management in that sensitive area of prison discipline and security. The decision in this case will be very important to the public, state law enforcement officers, and municipal officers in that the main issue here is whether or not the Fourteenth Amendment contemplates the substitution of judicial opinion for the opinion of competent prison administrators as to procedures which have been determined by such administrators to be desirable or necessary for the maintenance of prison discipline and security.

We respectfully submit that if this Court should hold the statutes involved in this case invalid it does not necessarily follow that a federal court should affirmatively and inflexibly force the racial integration of every state prison, county jail, city jail and small town calaboose in the State of Alabama as was done by the District Court in this case without regard to prison security and discipline and other valid considerations. The only witness offered by the Appellees in the District Court on the issue of integration of prisons and jails in Alabama was without any experience as to Alabama prisons and without any knowledge as to county and city jails in the State, and his experience has been entirely in the Federal Prison System (R. 152).

This witness, placed on the stand as an expert by the Appellees, was their only witness and his apparent feeling that racial integration of a prison should not be subordinated to prison security and safety is shown by a discussion of the testimony of Mr. Thomas R. Sard, Commissioner of Correction of the District of Columbia, Superintendent Weakley, and Deputy Superintendent Charles M. Rogers of Lorton Penitentiary referred to In *Edwards vs. Sard*, supra. This discussion, as shown by the record in this case, occurred on cross-examination of Mr. Boone and was as follows:

"Q. Are you —— do you know Mr. Charles M. Rogers, Deputy Superintendent of Lorton Penitentiary?

A. No, I don't.

Q. Do you agree with the statement that he made that was reported in Edwards versus Sard, 250 Federal Supplement 977, that the race of prisoners is one factor in deciding which dormitory to assign them to; do you agree or disagree with that?

Mr. Morgan: Object for just one point; I would like for the witness to be able to see the document from which Mr. Breckenridge is reading; he might just give it to him and let him familiarize himself with it.

Mr. Breckenridge: It is a copy from the Federal Reports.

Mr. Morgan: I thought it might be better for the witness to read what —— the words you were referring to in there. You might point out ——

Q. Mr. Boone, I was referring to this statement by the Court that Mr. Charles M. Rogers, Deputy Superintendent of Lorton —— the Court says, 'However, when examined whether he considered the race of prisoners as one factor in deciding which dormitory to assign them to, Mr. Rogers answered that he did.' Now, all I want to know, do you agree or disagree with that statement?

A. Well, I disagree with Mr. Rogers.

Q. You disagree with that. Now, do you know Mr. —— Mr. Sard, Edward Sard —— Thomas R. Sard, Commissioner of Corrections for the District of Columbia ——

A. No.

Q. —— do you know him?

A. No.

Mr. Fletcher: I didn't hear his answer.

Mr. McBee: He said 'No'.

A. No, I don't.

Q. Let me read this statement in the notes of that case, which says that 'Mr. Sard testified as follows: "We would like to see a reduction in the number of all-Negro dormitories. We believe that there is an advantage to both races if there can be interracial mixing to the extent that this can be done and maintain the security and safety of the institution." Now, do you agree with Mr. Sard that the question of security and safety of the institution is part of the problem of mixing the races?

A. No, I don't.

Q. You do not; all right. Now, let me read you from the same report, 'The Testimoney of Superintendent Weakley and Director Sard, on the other hand, reflected serious doubts about controlling the situation should total integration be ordered at this time'. Now, I believe your testimony was that integration of the races was not a problem relating to prison security. Now, do you agree or disagree that there would be a problem?

A. Could I say that at this time is the statement there, the crucial statement; he said, 'At this time'. Now, if the atmosphere is poor, if management is not ready for it,

if the people and you —— and if the process of desegregation is handled poorly, why, yes, you would have some difficulty, possibly.

Q. All right. Now, this note says, 'Moreover, controlling disturbances is not the only legitimate security concern of prison officials. Equally important is their desire to prevent disturbances from erupting.' Now, do you agree with Mr. —— Superintendent Weakley and Director Sard that equally important with the integration of the races is the desire to prevent disturbances from erupting?

A. No, I don't; because I honestly believe that in an integrated situation, tension will go down if properly managed, and that incidences will be reduced. In fourteen years in Atlanta, we went through all kind of integration process, and I never saw any trouble at all.

Q. You do not agree with them in these respects?

A. No, I don't." (R. 155-157)

As set out heretofore in this brief, the Courts have held that many rights are lost by persons when they are committed to prison, and rights derived from the Fourteenth Amendment are no exception when necessary or desirable in the interest of prison security and discipline. Prior to the decision of the District Court in this case, we do not believe any Federal Court has subordinated prison security to claimed constitutional rights. We respectfully contend that the determination as to whether the separation of the races in a particular prison is necessary or desirable to protect the discipline and internal security of the prison should be a matter to be determined by the prison administrators of the particular prison. Their judgment, if fairly and honestly made in this respect, should not be overturned by a Federal Court. The Appellees in this case seem to equate the integration of prisons with the integration of schools without taking into consideration the difference in the nature of a prison and a school or the difference in the primary purpose of a prison and a school. The tremendous difference between these two institutions makes inappropriate the many opinions

dealing with racial integration of schools. The same thing can be said of these cases with regard to integration of parks, airports and other public facilities patronized by the general population.

Most people in this Nation who are members of the general population, are law abiding and non-violent, and even though many of the law abiding and non-violent individuals may personally disapprove of total integration in many aspects of American life, they can nevertheless be counted upon to recognize the need of this Nation for obedience to law and will subordinate their personal opinions and beliefs in the area of race to the demand of the law where the law prohibits segregation. A prison or jail population is composed of a far greater proportion of violent, hostile and non-law abiding individuals than will be found in the general population. Recognition must be made of this fact in determining whether or not a particular prison or jail facility or activity should be integrated. The evaluation of this question as to any particular jail should not be made in the distant marble halls of the judiciary, but should be made by the prison administrators of the prison or jail involved, who best know the conditions which exist there.

Prior to December 12, 1966, the State and local authorities were limited in the exercise of their discretion by the mandate of the various state statutes. Since that time, those authorities had been faced with an opposite mandate from the federal court. The district court should not have assumed, and this court should not assume, that if allowed the opportunity the prison and jail authorities of Alabama cannot be trusted to operate our prisons and jails in a non-discriminatory manner. The various prison and jail officials should be given the opportunity to exercise their judgment and discretion and to show that in the exercise of that judgment and discretion they will not attempt to frustrate the obvious desire of the federal judiciary that no persons, whether in or out of prison, be subjected to discrimination on the basis of race. If, after the passage of a reasonable transitional period, it appears that the prison and jail administrators are continuing a strict policy of segregation of the races not required by the necessities of prison discipline, security or other valid considerations, the courts can once again step in and at that time, when the state and local authorities have shown

themselves to be unwilling or incapable of eliminating all racial segregation in the prisons not required for prison discipline and security, that will be the time for the federal court to specifically outline what the various authorities must do and when.

The District Court has taken two giant steps when only one can possibly be justified at the present time and under the facts presented to the district court. Even if this Court finds that the District Court was justified in its first giant step wherein it struck down the state laws requiring segregation in the prison system, this Court should limit the effect of the district court's order to that step only so that the various state and local prison and jail authorities may be given the opportunity to administer the operation of their prisons and jails in a lawful manner as seems best in the exercise of their judgment and discretion unhampered by the various state segregation statutes or the arbitrary district court deadlines.

CONCLUSION

We respectfully ask this Court to hold that the separation of the races in a prison or jail by administrative officials in charge of such prison or jail when they are of the opinion that such separation will aid in maintaining discipline and prison security is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would pre-empt the exercise of lawful and reasonable discretion on the part of prison administrators. A prisoner loses his right to select his associates when he is committed prison. His associates are selected by the prison administrators on many bases. The factor of race is no less valid a consideration than sex, age or criminal record, in many circumstances.

It is unnecessary for the court to affirm the lower court decree in all particulars to definitely prohibit racial discrimination in prisons. Each instance of alleged unconstitutional racial separation or discrimination can be readily reviewed and corrected as it arises.

For the reasons stated above, it is respectfully submitted that the Order and Decree of the District Court in this case should be reversed.

Respectfully submitted,

MacDONALD GALLION
Attorney General of the
State of Alabama

GORDON MADISON
Assistant Attorney General
of the State of Alabama

NICHOLAS S. HARE
Special Assistant Attorney General
of the State of Alabama

J. M. BRECKENRIDGE, City Attorney
for the City of Birmingham,
Attorney for Robert K. Austin,
As Warden of the City Jail of
Birmingham, Alabama, Appellant.

CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11 day of September, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

Hon. Charles Morgan, Jr.
5 Forsyth Street, N. W.
Atlanta, Georgia

Hon. Orzell Billingsley, Jr.
1630 Fourth Avenue, North
Birmingham, Alabama

Hon. Melvin L. Wulf
156 Fifth Avenue
New York, New York

Messrs. Dominick, Fletcher and Yeilding
927 Brown Marx Building
Birmingham, Alabama

Nicholas S. Hare

NICHOLAS S. HARE
Special Assistant Attorney General
of Alabama
Tyson Building
Montgomery, Alabama 36104

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CALIPH WASHINGTON,) HOSEA L. WILLIAMS, JU-) LIA ALLEN, individually and) as mother and next friend of) WILLIE ALLEN, a minor,) WILLIE ALLEN, AGNES) BEAVERS, individually and) as mother and next friend of) CECIL McCARGO, JR., a mi-) nor, CECIL McCARGO, JR.,) JOHNNIE COLEMAN, and) THOMAS E. HOUCK, JR., for) themselves, jointly and several-) ly, and for all others similarly) situated,)

Plaintiffs,)

vs.) CIVIL ACTION NO. 2350-N

FRANK LEE as Commission-) er of Corrections of Alabama;) JOHN F. BRITTON, CHAR-) LIE CASHION, HERSCHELL) LUTTRELL, DR. MAX Mc-) LAUGHLIN and WILLIAM) MITCH, as members of the) Board of Corrections of Ala-) bama; A. MELVIN BAILEY,) as Sheriff of Jefferson County,) Alabama and all other sheriffs) of Alabama, jointly and sever-) ally, who are similarly situated;) ROBERT K. AUSTIN as War-) den of the City Jail of Birming-)

ham, Alabama, and all other) wardens and jailers of city and) town jails of Alabama, jointly) and severally, who are simi-) larly situated,)
Defendants.)

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges.

JOHNSON, District Judge:

ORDER

This is an action for declaratory and injunctive relief instituted by one white and five Negro citizens on their own behalf and on behalf of other persons similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. The plaintiffs seek a declaration concerning the rights of Negro citizens, male and female, not to be segregated, classified, designated, or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. Further, plaintiffs assert that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. Plaintiffs ask that said statutes be declared unconstitutional and that the defendants be enjoined from requiring segregation by race in any of the state, county and city penal institutions in the State of Alabama.

Of the Negro plaintiffs, Caliph Washington is confined in the Jefferson County Jail, Jefferson County, Alabama, awaiting retrial on a capital charge; Johnnie Coleman, Willie Allen and Cecil McCargo, Jr., are confined in state penal institutions, and prior to their present incarceration had been confined under racially segregated circumstances in either city, town or county jails in Alabama; and Hosea L. Williams and Thomas E. Houck, Jr., were incarcerated in the Birmingham City Jail at the time this case was instituted.

The defendant Frank Lee is Commissioner of the Board of Corrections of the State of Alabama and as such is invested with the authority and charged with the duty of serving as the chief administrative officer of the Alabama Board of Corrections. Title 45, § 10(5), Code of Alabama, Recompiled 1958. The defendant A. Melvin Bailey is the duly elected and qualified sheriff of Jefferson County, Alabama, and as such has the legal custody and charge of the Jefferson County Jail and all prisoners committed thereto. Title 45, § 115, Code of Alabama, Recompiled 1958. The defendant Robert K. Austin is warden of the City Jail of Birmingham, Alabama, and in this capacity has the custodial duty and authority over prisoners in that jail. The defendants Bailey and Austin are sued individually and as representatives of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama.[1]

I

As noted in the complaint filed with the Clerk of this Court on February 18, 1966, plaintiffs Williams and Houck allege that they were then incarcerated in the City Jail of Birmingham, Alabama. It now appears, however, that the charges against Houck have been nol prossed and that Williams has entered a plea of guilty to the charges against him and has paid the fine imposed upon said plea. For these reasons, the defendants Austin and Bailey contend that plaintiffs have no standing to challenge any of the statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham or Jefferson County. In *Singleton v. Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), this same issue was raised in that the plaintiff had completed the actual service of his sentence. In *Singleton*, the Court set forth the general principle applicable in such instances:

---

[1] In the complaint as originally filed, plaintiffs also named as defendants the individual members of the Board of Corrections of Alabama and asked that said defendants be enjoined from excluding Negroes from employment, or otherwise discriminating against Negroes in their efforts to secure employment with the Alabama prison authorities. Upon a pretrial hearing of this cause, and by agreement of counsel, this phase of the lawsuit was stricken.

> The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use.

There is no question but that the evidence in this case reflects a "past use" of the penal facilities of the City of Birmingham and Jefferson County by some of these plaintiffs. As to that part of the general rule stated in *Singleton* concerning the "reasonable possibility of future use," this Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws of the State of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell v. United States*, 313 U.S. 80. Under the circumstances reflected by the evidence in this case, all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail and the Jefferson County Jail is that the operation of these institutions, as that operation presently exist, "permit[s] the recurrence of comparable violations." *Henderson* v. *United States*, 339 U.S. 816. In this regard, the Supreme Court of the United States in *Barrows* v. *Jackson*, 346 U.S. 249, observed that the rule against relying on the constitutional rights of another (who may be in this case presently imprisoned in either the penal facility of the City of Birmingham or of Jefferson County) is not part of the constitutional requirement of standing, but is a rule of self-restraint which the court has developed for its own governance, and, for that reason, is a mere rule of practice not to be applied where it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of competent jurisdiction[2]. See also *Ferguson* v. *Buchanan*, No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965, where the criminal prosecution against the plaintiff, who was seeking to enjoin

---

[2] In this connection, defendant Austin testified that the average length of time prisoners are incarcerated in the Birmingham City Jail is from seven to fifteen days. Under such circumstances, it would be impossible for a prisoner to file and secure an adjudication on his case before he was released.

the sheriff of Dade County, Florida, from maintaining segregated facilities in the jails of Dade County, was nol prossed before the case was submitted to the district court. That court, nevertheless, found the Florida statutes that required segregation in county jails on the basis of race unconstitutional, and enjoined the defendants from operating or maintaining jails in a manner requiring segregation of the races. For these reasons, it is evident that the contention on the part of defendants Austin and Bailey that these plaintiffs do not have standing to challenge the statutes and practices requiring segregation of the races in the penal facilities of the City of Birmingham and Jefferson County is not well taken.

II

As to the contention of the defendants Austin and Bailey that they are not representative defendants of other wardens, jailers and sheriffs in the State of Alabama and, therefore, that these plaintiffs cannot maintain this action through them as representatives of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure, this Court concludes to the contrary. While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent—a requirement which, as indicated, is satisfied in this case—then it becomes immaterial whether certain of these class defendants are not otherwise identically situated. 3 Moore, Federal Practice, ¶ 23.10 at 3454

(2d Ed. 1963). See *Harris* v. *Palm Springs Alpine Estates, Inc.*, supra (citing cases).[3]

III

The only defense offered to the contention that the statutes involved herein[4] violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissable inquiry by the courts. We disagree. Since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated. As stated by the Fifth Circuit in *Singleton* v. *Board of Commissioners*, supra:

> Twelve years ago, in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State. "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." Johnson v. Virginia, 1963, 373 U.S. 61, 62, 356 F. 2d at 772.

Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges

---

[3] On this point this Court has serious misgivings as to the right of either the defendant Austin or the defendant Bailey to raise this particular question in this case. It appears that such a defense would, if valid, inure only to the benefit of other members of "the class" that these defendants are alleged to represent. The contention on the part of these defendants that, if they are not proper representatives of the other members of the class, venue in this district is improper as to them is without legal basis. Title 28, § 1392 (a), United States Code.

[4] The Alabama statutes that require segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

and rights, a retraction justified by the considerations underlying our penal system,"[8] it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law. *Cooper* v. *Pate*, 378 U.S. 546 (1965); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D.C. Cir. 1961). In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances[9] prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Plaintiffs' contention that the separation of prisoners solely on the basis of race constitutes a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment to the Constitution of the United States is plainly without merit. There is no question but that, through the action of the Fourteenth Amendment, the Eighth applies to the states, *Robinson* v. *California*, 370 U.S. 660 (1962). However, the Cruel and Unusual Punishment Clause of the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, *Black* v. *United States*, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); *Hemans* v. *United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947); and segregation of individuals, while incarcerated, solely by reason of their race does

---

[8] **Price v. Johnston, 334 U.S. 266 (1948).**

[9] **For example, the "tank" used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the "tank" on Saturday nights in the Birmingham jail reaches fifty or more.**

not, in the opinion of this Court, constitute cruel and unusual punishment.

IV

The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel, such as Frank Lee as Commissioner of the Board of Corrections for the State of Alabama and A. Melvin Bailey as sheriff of Jefferson County, Alabama, deserves the most careful consideration of this Court. In this connection, it is recognized that "[t]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings," *Edwards* v. *Sard*, 250 F. Supp. 977 (D.C. Dist. 1966), and in light of this recognition this Court will not at this time require an immediate and total desegregation of state, county and city penal facilities in the State of Alabama. However, the several honor farms, the educational programs, the youth centers and the hospitals in the state system must be completely desegregated immediately. All facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women, must be completely desegregated within six months. As to the maximum security institutions, such as Kilby Prison and Atmore Prison, the evidence reflects that considerations of security and discipline require a more gradual desegregation. In this connection, the Court will expect complete and total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year. As to the county and city systems, complete desegregation should be achieved within six months in all areas, including quarters, except in very exceptional instances as, for example, in the use of the "tank" mentioned previously.

No plan of desegregation will be required of any of these defendants. However, since it is the function and duty of the Board of Corrections for the State of Alabama, and particularly the Commissioner thereof, pursuant to §§ 3, 7, 10(1), 10(5), 10(8) and 11, to inspect and generally supervise every county and municipal jail or prison in any incorporated town and city

in the State of Alabama having ten thousand or more population, this Court will require the Commissioner of the Board of Corrections to supervise not only the desegregation of state penal facilities as herein ordered, but also the desegregation of the jails in the counties throughout the State of Alabama and in all towns and cities throughout the state. The Commissioner of the Board of Corrections will be required to report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and the county and city jails, and other penal facilities throughout the State of Alabama.

In view of the declarations herein made concerning the unconstitutionality of the state statutes in question to the extent that those statutes require segregation of the races solely by reason of their color, and with the further declarations as to the unconstitutionality of the practice of segregating prisoners in any of the state, county or city penal facilities solely by reason of race, and the declarations concerning the duty of appropriate officials to take the necessary steps within the periods herein indicated, this Court does not consider it necessary to issue a formal injunction in this case at this particular time. However, there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them by the law generally and by this order specifically to cease the practice of arbitrarily segregating the races in the state, county and city penal facilites. The officials of the State of Alabama, whether they be concerned with the state penal facilities or the county and city penal facilities, have an affirmative duty and responsibility to effect desegregation of these facilities in accordance with this decree. Jurisdiction of the case will be specifically retained for all purposes.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, be and are, in each instance, declared violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama.

It is further ORDERED that the defendant Frank Lee as Commissioner of the Board of Corrections for the State of

Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree.

It is further ORDERED that the defendant A. Melvin Bailey as sheriff of Jefferson County, Alabama, and each sheriff of each county in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the county jails and any other penal facilities and operations that may be maintained by any such county, within a period of six months from the date of this decree.

It is further ORDERED that the defendant Robert K. Austin as warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree.

It is further ORDERED that the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama.

It is further ORDERED that each sheriff and each warden in the counties, cities and towns in the State of Alabama furnish the Commissioner of the Board of Corrections for the State of Alabama such reports and information that may be required by said Commissioner in the discharge of his duty to report to this Court.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the defendants, but the Court is of the opinion that the State of Alabama should pay the costs for the defendants.

Done, this the 12th day of December, 1966.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

APPENDIX "B"

Section 4, Title 45

Code of Alabama, Recompiled 1958

"4. *Authority as to tubercular patients, and management of hospitals.*

The state department may also make such changes in the existing arrangements with reference to the segregation and treatment of tubercular patients, and other patients needing long time hospital detention and care, who are serving sentences for conviction of crime, so as to permit such patients to be transferred to the custody and care of those officers and agents who have the charge and control of the detention hospital or hospitals of the state convict system; the agents in charge of such hospital or hospitals during the period of the treatment of such convict patients are constituted the legal custodians of such convicts. Any such hospital or hospitals, or other places suitable and used under the convict system for the segregation and treatment of tubercular or long time patients may be opened under the authority of the state department and may be used for the segregation treatment and care of other inmates afflicted with tuberculosis or other diseases or ailments requiring long time detention, treatment and care, and who may be received from any other institution covered by this article, or from any hospital or other duly accredited and responsible institution in the state with which the state department may co-operate in the matter of the treatment or care of such patients. There shall be proper separation of convicts from free persons, whites from blacks, males from females, in such hospital or place of detention. The department is given general authority over the reception, care, custody and segregation of such persons, and is also vested with the power and authority, by and with the approval of the governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals and places of detention, except as may be otherwise provided by this article."

Section 52, Title 45

Code of Alabama, Recompiled 1958

"52. (3643) (6547) (4493) (4658) *Males and females not worked or confined together; nor whites and blacks.*

It shall be unlawful for white and colored convicts to be chained together or to be allowed to sleep together; and it shall be unlawful to chain together or to confine together in the same room or compartment, male and female convicts. Whenever in the judgment of the governor and the director, it is practicable to do so, arrangements shall be made for keeping white and colored convicts at separate prisons and they shall not be allowed to be kept at the same place."

Section 121, Title 45

Code of Alabama, Recompiled 1958

"121. (4806) (7196) (4951) (4540) (4491) (3789) (241)

What prisoners kept separate.

Men and women, except husband and wife, must not be kept in the same room; and white and colored prisoners, before conviction, must also be kept separate and apart, if there be a sufficient number of apartments for that purpose."

Section 122, Title 45

Code of Alabama, Recompiled 1958

"122. (4856) *Prisoners separated by race and sex.*

It shall be unlawful for any sheriff, or jailer, or other keeper of the jail or the town or city prison, to confine in the same room or apartment of any jail or prison white and Negro prisoners; and men and women, except husband and wife, must not be kept in the same room or apartment."

Section 123, Title 45

Code of Alabama, Recompiled 1958

"123. (3722) (6619) (4557) (3755) (4321) *Imprisoning together white and colored prisoners before conviction.*

Any jailer or sheriff, having the charge of white and colored prisoners before conviction, who imprisons them permanently together in the same apartment of any jail, or other place of safe keeping, if there is a sufficient number of apartments to keep them separate, must, on conviction, be fined not less than fifty nor more than one hundred dollars."

Section 172, Title 45

Code of Alabama, Recompiled 1958

"172. (4866) *Janitor service and bathing facilities.*

The court of county commissioners, board of revenue, or city council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails; shall provide bathing facilities separate for Negroes and whites, males and females, soap and towels, hot and cold water, clean and sufficient bedding, and with clean clothes when the prisoners are not able to provide them."

Section 183, Title 45

Code of Alabama, Recompiled 1958

"183. (4877) *Size, etc., of jail, etc.*

Each county jail, or town or city prison, must be of sufficient size and strength to contain and keep securely the prisoners confined therein; and must contain at least four separate apartments, one for white men, and one for white women, one for Negro men, and one for Negro women. It shall be fireproof, properly ventilated, sufficiently lighted, by day and night, adequately heated, containing adequate sanitary plumbing, and sewerage connections, including separate bath facilities for whites and Negroes."

APPENDIX "C"

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

FRANK LEE, as Commissioner of Corrections of Alabama, et al, Appellants	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION
vs.	
CALIPH WASHINGTON, et al Respondents	

AFFIDAVIT OF A. FRANK LEE, COMMISSIONER OF CORRECTIONS OF ALABAMA

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I am A. Frank Lee, and I am Commissioner of the Board of Corrections of the State of Alabama. I have been in law enforcement work all of my adult life. I served as Deputy Sheriff and Sheriff of Greene County, Alabama, then from 1954, I served as Deputy Commissioner of the Board of Corrections and since 1960 as Commissioner.

On November 29, 1966, I testified in the hearing of the above case in the District Court. In essence, my testimony was that, in my opinion, orderly desegregation could be accomplished in the Alabama prison system without unduly upsetting or impairing prison discipline or security provided the prison officials were given sufficient time and were allowed some administrative discretion. Based upon my lifetime of experience in law enforcement work, and constant observation of the present situation in the Alabama prisons and other state prisons, I see now that we must have more time than was allowed by the District Court.

We must have time and opportunity to train and orient our personnel and to prepare the prison inmates. After all, our prison personnel are poorly paid and largely uneducated (10th

grade education being all required). The prisons in some of the more fortunate states are staffed with psychiatrists, psychologists, case workers, and counselors all who help with prisoner orientation, etc. We have none.

Prisoners must be carefully prepared for any radical change in their routine or environment. It has been my experience that nothing can be changed suddenly in prisons.

The prisoners must be acquainted with the new program and, so far as is possible, an attempt must be made to secure their understanding and acceptance.

No particular problem is presented by the prospect of racial integration with many of our prisoners, but with other prisoners, difficult problems are arising, some of which have not yet come to the surface. It appears to me that it will be necessary to take certain steps towards integration, then wait, then take further steps and constantly observe the reaction. There are many violent and incorrigible convicts of both races in our prisons who are looking for excuses and ways to make trouble. It will be inviting trouble to radically and suddenly make a change in prison routine as, unquestionably, presently ordered integration will do. The dangers of quick changes in prison routine are not limited to mere racial changes. This is not a question of the convenience of, or preference of, the prison officials, but is a matter involving safety and public interest.

Our existing prisons were not built with integration in mind. The first of our new facilities are scheduled to be ready in two years.

A serious and dangerous situation is presented. Our overriding concern is for the prevention of riots and disorders, both for the physical safety of the prisoners and for the prevention of their escape during any such commotion. Although riots are the chief worry, I am also concerned about the posssibility of prison feuds which can be extremely dangerous even though they may involve a smaller number of individuals. For instance, we are not in position to handle sex deviates now; we will be in a better position with the new facilities. We do not know what

will develop, and we are fearful of what will develop, if these people are racially mixed; we simply have no empirical guides in this regard, and this is one of the areas where trial and observation will be wise.

I understand that our prisoners have heard of, and have had the suggestion of the recent riots in the California and Michigan prisons; I am fearful that immediate integration will disrupt the relative calm of the Alabama prison system. For these reasons, I believe that it is in the best interest of the prisoners themselves that the Court ordered integration be stayed until the Supreme Court has an opportunity to review the case. The Supreme Court may very well hold, in line with other court decisions, that discretionary segregation by race, just as segregation by sex or age, is a matter of prison discipline, rather than racial discrimination. Then, should the State prisons return to the time proven procedures, the disruptive effect of changing back and forth would be compounded.

After all, the existing system has been in effect for more than 100 years, and a relative short delay in changing the system could do no substantial harm to the public or to any individuals, but a precipitous change could be disasterous.

In my capacity as Commissioner of the Alabama State Board of Corrections, I respectfully request an extension of the stay granted by the District Court, or an additional stay, pending this appeal.

A. FRANK LEE /s/

A. Frank Lee

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Sworn to and subscribed before me this the 1st day of March, 1967.

CONNIE A. HARPER /s/

Notary Public